SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 725

WILSON W. RICHARDSON,

Petitioner,

vs.

THE JAMES GIBBONS COMPANY, A BODY CORPORATE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR PETITIONER.

GEORGE A. MAHONE,
Attorney for Petitioner.

WYLIE L. RITCHEY,
Of Counsel.

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Opinions Below.

The opinion of the District Court granting defendant's Motion to dismiss was filed March 17, 1942, and is not reported; the opinion and judgment of the Circuit Court of Appeals affirming the decision of the District Court were rendered December 26, 1942, — Fed. (2d) — (R. 2).

Jurisdiction.

The jurisdiction of this Honorable Court is invoked under section 240 (a) of the Judicial Code as amended (28 U. S. C. A. 347). Petition for a stay of the mandate pend-

ing this application for a review of the judgment of the Circuit Court of Appeals was duly made, and allowed on January 13, 1943. On March 1, 1943, this Honorable Court granted the writ of certiorari for which petitioner had made application.

Statement of the Case.

This action arises under the Fair Labor Standards Act of 1938, chapter 676, 52 Stat.; U. S. C. Title 29, Section 201 et seq. Section 13 (b) (1) of said Act provides for certain exemptions with respect to employees who may be subject to the provisions of Section 204 of the Motor Carrier Act, 1935 (now Interstate Commerce Act, Part II); this latter Act is also involved in the questions presented. The relevant provisions of these statutes are set forth in the Appendix.

The case was tried on complaint, motion to dismiss, amendment to the complaint, amended motion to dismiss and stipulation of certain facts by the parties. The following are the essential facts:

Wilson W. Richardson brought this suit under the Fair Labor Standards Act for unpaid overtime compensation alleged to be due him for hours worked in excess of the maximum number prescribed in section 7 (a) of the Act, for an additional equal amount as liquidated damages, court costs, and reasonable attorney's fee, as provided in section 16 (b) of the Act. He was employed at a regular fixed weekly salary. In some few weeks during the off-seasons he worked less than the number fixed in section 7 (a) of the Act and in the great majority of other weeks he worked considerably in excess of that number. He was paid a uniform salary regardless of whether his days required short or long hours. His on-duty hours were regulated by the amount of work required to be done. He began his employ-

ment with respondent several years prior to the effective date of the Act, October 24, 1938, and remained in its employ until September 4, 1940.

Petitioner was employed as a "distributor-operator" and as such operated a tank truck from which he distributed hot asphalt preparations to finish roads or other surfaces.

Respondent is engaged in the general building and repairing of roads, driveways, airplane runways, and other work where asphalt preparations are used, and in connection with its business owns a fleet of trucks and asphalt distributors. Some of the asphalt distributors are operated by one man; the driver or operator, handling levers and asphalt distributing appliances from the driver's seat; other distributor trucks are two-man trucks in which the helper drives the truck and the distributor-operator operates the distributing machinery. Petitioner worked on both types of trucks. Respondent is a private carrier of its own property in interstate commerce by motor vehicle. Respondent has qualified and operated under the rules and regulations of the Interstate Commerce Commission since August 31, 1941.

This case covers a period of approximately two years employment from October 24, 1938, to September 4, 1940. Petitioner was on duty from a minimum of approximately 40 hours a week during slack periods to a usual maximum during busy seasons of approximately 85 hours per week.

Specification of Errors.

I.

The court below erred in holding that the Interstate Commerce Commission had jurisdiction over petitioner prior to a finding by the Commission that the need existed for the regulation of private carriers by motor vehicle.

II.

The court below erred in holding, as to private carriers by motor vehicle, that the word "power" in section 13 (b) of the Fair Labor Standards Act means the existence of the power and not its actual exercise.

III.

The court below erred in *not* holding that whatever driving of the trucks the petitioner did was but incidental to his main employment as a "Distributor-Operator", and that, therefore, he is within the provisions of the Fair Labor Standards Act.

ARGUMENT.

The contention in this case rests, substantially, upon the following:

Was the petitioner, at and during the time of his employment by the respondent, October 24, 1938, to September 4, 1940, under the jurisdiction of the Interstate Commerce Commission by reason of the Motor Carrier Act of 1935 (now Part II of the Interstate Commerce Act), Section 204 (a) (3), or was he entitled to claim the protection and benefits of the Fair Labor Standards Act of 1938, Section 7 (a)?

In the Fair Labor Standards Act of 1938, under the caption of "Exemptions", we find that Section 13 (b) provides (so far as pertinent to this proceeding):

> "The provisions of section 7 shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935;"

Section 204-(a) (3), of the Motor Carrier Act of 1935, touching upon private carriers of property by motor vehicle (and respondent is such a Private Carrier) provides that it shall be the duty of the Commission

> "To establish for private carriers of property by motor vehicle, *if need therefor is found*, reasonable requirements to promote safety of operation, and to that end prescribe qualifications and maximum hours of service of employees, and standards of equipment. *In the event such* requirements are established, the term 'motor carrier' shall be construed to include private carriers of property by motor vehicle in the administration of sections 204 (d) and (e) * * *" etc. (Italics supplied.)

The Circuit Court of Appeals for the Fourth Circuit states in its opinion, in this case (decided Dec. 26, 1942, —— Fed. (2d) ——):

> "In United States *v.* American Trucking Association, 310 U. S. 534, it was held that Section 204 (a) of the Motor Carrier Act applied only to those employees whose duties affect the safety of operation. We agree with the District Judge, in the instant case, that the duties of Richardson did affect the safety of operation."

It is submitted that the citation of the American Trucking Association decision, *supra*, by the Circuit Court of Appeals is not in point, for the reason that this Honorable Court in said case did not rule as to "employees of private carriers", but its decision was limited to "employees of common or contract carriers". In the closing portion of this Honorable Court's decision in the *American Trucking Association* case, *supra*, in the last sentence of the paragraph preceding the caption "*Conclusion*" it is stated:

> "It seems equally evident that where these vehicles or operators were *common or contract* carriers, it was not intended by Congress to give the Commission power

to regulate the qualifications and hours of service of employees, other than those concerned with the safety of operations." (Italics supplied.)

And under the caption "*Conclusion*" it is set forth:

"Our conclusion, in view of the circumstances set out in this opinion, is that the *meaning of employees in Section 204 (a) (1) and* (2) is limited to those employees whose activities affect the safety of operation. The Commission has no jurisdiction to regulate the qualifications of hours of service of any others." (Italics supplied.)

The instant question, so far as diligent search by counsel reveals, has been passed upon by only two Circuit Courts of Appeal; the Eighth and the Fourth Circuits.

In *Bayley, et al.* v. *Southland Gasoline Co.* (C. C. A. 8th), decided November 2, 1942, —— Fed. (2d) ——, the court said:

"It is apparent from a reading of the Motor Carrier Act that while the Congress determined for itself the necessity for the regulation of common and contract carriers by motor vehicle in the respects stated in the Act, it did not determine the necessity of regulating private carriers by motor vehicle, such as the appellee here, but left the determination of that question to the Interstate Commerce Commission, if, in the words of the Act, 'need therefor is found.' Obviously the three subsections of the Act" (subsections (1) (2) (3) of Section 204 (a)) "read together, clearly imply the intention of Congress that the power of the Commission with respect to private carriers should depend upon a finding by the Commission that the regulation was needed:"

Then after discussing the intent and purpose of the Fair Labor Standards Act, the court (C. C. A. 8th) continues:

"We hold that until the Interstate Commerce Commission made the finding of the necessity of the regula-

tion of private carriers with respect to the matters specified in the Motor Carrier Act of 1935, it was without power to prescribe either qualifications or maximum hours for the employees of such carriers." (Bayley et al. *v.* Southland Gasoline Co. supra.)

The Circuit Court of Appeals for the Fourth Circuit holds that the Interstate Commerce Commission had "power" over the petitioner without the necessity for such a finding as is set forth in section 204 (a) (3) of the Motor Carrier Act of 1935. With this conclusion petitioner disagrees and holds that the decision in the *Bayley* case, *supra*, is the correct statement of the law.

Delegation of Legislative Power—Due Process.

In *Panama Refining Co.* v. *Ryan, et al.*, 293 U. S. 388, this Honorable Court stated, in part, at page 432:

"To repeat, we are concerned with the delegation of legislative power. If the citizen is to be punished for the crime of violating a legislative order of an executive officer, or of a board, or commission, due process of law requires that it shall appear that the order is within the authority of the officer, board, or commission, *and if that authority depends on determinations of fact, those determinations must be shown.* (Italics supplied.) As this Court said in Wichita Railroad & Light Co. *v.* Public Utilities Comm., in 260 U. S. 48, 59,.

"In creating such an administrative agency the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function. It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined and show a substantial compliance therewith to give validity to its action. When, therefore, *such an Administrative agency is required as a*

condition precedent to an order to make a finding of facts, the validity of the order must rest upon the needed finding. If it is lacking, the order is ineffective." (Italics supplied.)

Section 204 (a), (3) of the Motor Carrier Act of 1935 delegates no power to the Interstate Commerce Commission over "private carriers" unless a "need therefor is found". This obviously connotes findings of fact to ascertain such a "need"; thus a precedent thing is to be done before the Commission takes jurisdiction or its power attaches (see *Panama Refining Co.* v. *Ryan, supra*).

As a matter of fact and of record the Interstate Commerce Commission did not make effective until October 15, 1940 (after petitioner had left employment of respondent), its Order assuming jurisdiction over private carriers.

On May 1, 1940 (I. C. C. Reports, Motor Carrier Cases Vol. 23, page 1), Ex Parte MC-3, the Commission decided a need was found for Federal Regulation of private carriers, and (page 44) stated an appropriate order giving effect to the findings would be entered. However, a number of postponements were made, and on September 30, 1940,

On May 1, 1940 (I. C. C. Reports, Motor Carrier Cases, Vol. 26, page 205) Ex Parte MC-3, in connection with regulations to promote safety of operations of private carriers of property in interstate commerce, stated at page 208, last paragraph:

> "Our Order of May 1, 1940, should be vacated and set aside and a new order based on the findings made in our report of May 1, 1940, as modified by this report, should be entered effective October 15, 1940."

Another aspect of this case relates to the duties performed by petitioner for respondent as a "Distributor-Operator", and the incidental work done by petitioner in driving the trucks. Petitioner operated the machinery of the "Dis-

tributor" mounted on the truck chassis and at times acted as driver of the trucks. His work in operating the machinery of the "Distributor" was that of a technician; his work in driving the trucks, that of a Chauffeur. Was the incidental chauffeuring sufficient to take him without the protection and deprive him of the benefits of the Fair Labor Standards Act; petitioner holds that it was not. Petitioner suggests that the literal interpretation of the Fair Labor Standards Act of 1938, as indicated in the opinions of the District Court and the Circuit Court of Appeals, defeats the remedial purposes and intent of said Act, one of which was to insure employees, engaged in "commerce", overtime compensation for hours worked in excess of the legal maxima set forth in that statute.

Statutes are not to be so literally construed as to defeat the purpose of the legislature.

U. S. use of Hill v. *American Surety Co.*, 200 U. S. 197.

Exceptions from a general policy which a law embodies should be strictly construed; that is, they should be so interpreted as not to destroy the remedial processes intended to be accomplished by the enactment.

Spokane & I. E. R. Co. v. *U. S.*, 241 U. S. 344.

Conclusion.

Wherefore, it is respectfully submitted that the judgment of the court below was in error and should be reversed.

Respectfully submitted,

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WYLIE L. RITCHEY,
Of Counsel.

March 9th, 1943.

APPENDIX.

Fair Labor Standards Act of 1938.

Section 13 (b) * * * "The provisions of Section 7 shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of Section 204 of the Motor Carrier Act, 1935; * * *"

Motor Carrier Act of 1935.

"Sec. 204 (a) It shall be the duty of the Commission—

"(1) To regulate common carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

"(2) To regulate contract carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

"(3) To establish for private carriers of property by motor vehicle, if need therefor is found, reasonable requirements to promote safety of operation, and to that end prescribe qualifications and maximum hours of service of employees, and standards of equipment. In the event such requirements are established, the term 'motor carrier' shall be construed to include private carriers of property by motor vehicle in the administration of section 204 (d) * * *"